

1 Gary S. Lincenberg - State Bar No. 123058  
glinenberg@birdmarella.com  
2 Thomas V. Reichert - State Bar No. 171299  
treichert@birdmarella.com  
3 BIRD, MARELLA, BOXER, WOLPERT, NESSIM,  
DROOKS, LINCENBERG & RHOW, P.C.  
4 1875 Century Park East, 23rd Floor  
Los Angeles, California 90067-2561  
5 Telephone: (310) 201-2100  
Facsimile: (310) 201-2110

6 Attorneys for Defendant  
7 Todd Michael Ficeto

8  
9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**  
11

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 vs.

15 FLORIAN WILHELM JURGEN  
HOMM, TODD MICHAEL FICETO,  
16 COLIN HEATHERINGTON, and  
CRAIG HEATHERINGTON,

17 Defendants.  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

CASE NO. 2:13-CR-00183 VAP

**Todd Ficeto's Brief In Response To  
Government's Sentencing Position**

Date: March 23, 2020  
Time: 9:00 a.m.  
Crtrm.: 8A

1       The Government's Sentencing Position Brief [Dkt. 286] recognizes that the  
2 mindless application of the sentencing guidelines would be improper here.  
3 However, the government's recommendation of 8 years (96 months) remains far too  
4 high, and fails to recognize the gross disparities that would result from such a  
5 sentence.

6       This case revolved around manipulation of share prices of certain penny-stock  
7 companies for the express purpose of inflating the portfolio values of a group of  
8 European hedge funds. According to the testimony at trial from Craig  
9 Heatherington – who received a DPA from the government – Florian Homm would  
10 dictate to Colin Heatherington the results that he wanted for each hedge fund, and  
11 Colin would then calculate stock prices that would get them to the stated goal.  
12 Colin would then place the trades with Tony Ahn. The government introduced  
13 numerous examples at trial of instant messages between Colin Heatherington and  
14 Tony Ahn where Colin was dictating closing prices to Tony Ahn. As Tony Ahn  
15 testified at trial, he would then place one of two types of trades to get a particular  
16 stock price there. In some instances, where there were available shares in the  
17 market – which meant that there was, in fact, a real market for these stocks – Tony  
18 would place trades in quantities that would drive the price of the stock up to the  
19 desired number. In other instances, where different hedge funds owned blocks of  
20 shares, Tony Ahn would place a cross-trade between the hedge funds, which  
21 allowed him to simply set a price, since he was placing a trade for both the buyer  
22 and seller of the security.

23       As noted in Todd Ficeto's opening brief, the government declined to  
24 prosecute Mr. Ahn. It also declined to prosecute Ms. Pagliarini, the compliance  
25 officer who approved all of the trades that form the basis of Mr. Ficeto's conviction.  
26 While Colin Heatherington's fate remains uncertain, as he battles extradition, both  
27 Craig Heatherington and Sean Ewing received DPAs from the government. The  
28 government downplays Mr. Ewing's culpability in its brief, but the facts don't

1 support this. The government's own witness, Darius Parsi, provided damning  
2 testimony about Mr. Ewing's knowledge, involvement and culpability. According  
3 to Mr. Parsi's testimony, after Mr. Parsi sent a pseudonymous whistleblower email  
4 to numerous third parties, Ewing managed to find out it was Mr. Parsi who sent the  
5 email. Mr. Ewing then contacted Mr. Parsi and was sufficiently threatening that Mr.  
6 Parsi agreed to retract his allegations, testifying that he was worried about his own  
7 safety and the safety of his family. Thus, Mr. Ewing, the Chairman of the Board  
8 and CEO of Absolute Capital, was placed on notice of Florian Homm's stock price  
9 manipulation, and his response was to cover it up through threats and intimidation.  
10 When Mr. Ewing reported it to the Board of Directors, he failed to tell them that it  
11 was Darius Parsi – a former member of the same Board of Directors – who made the  
12 report, he failed to provide details, he falsely stated that an investigation had been  
13 conducted that did not substantiate the allegations and, when asked for a copy of the  
14 email by another board member, he declined to provide it. He then continued as  
15 CEO, knowing this was going on, for another year. Despite this, Mr. Ewing  
16 received a DPA and paid \$8 million – less than a tenth of his wealth – to make this  
17 go away. Mr. Ewing was the head of the company in question, knew about and  
18 covered up the fraud, and made enormous amounts of money as the CEO as the  
19 company went public and then performed very well based on Homm's manipulated  
20 NAVs. And he paid his way out of this. Now, he is a free man with tens of millions  
21 of dollars in the bank.

22 As of now, the only person who has been incarcerated was Florian Homm.  
23 He was detained in an Italian jail (and then a hospital, based on his health issues) for  
24 approximately fourteen months. He is now outside the reach of U.S. extradition.  
25 Given this, the government's request for a sentence of 8 years for Todd Ficeto is  
26 inequitable. The only person who served time was detained for 14 months. Sean  
27 Ewing received no time. Craig Heatherington received no time. Tony Ahn and  
28 Elizabeth Pagliarini received no time. Having all of the punishment fall on one

1 person – because he decided not to flee (even with \$10 million in an overseas bank  
2 account), but to stay and have his day in court – would be deeply unjust, particularly  
3 in light of how involved people such as Tony Ahn and Sean Ewing were, or how  
4 Elizabeth Pagliarini, the compliance officer, signed off on each trade. (Indeed, the  
5 testimony of all of the government’s regulatory witnesses and experts could as  
6 easily have convicted Ms. Pagliarini as Mr. Ficeto.)

7       As the government notes, this is a case that is extremely old. The significance  
8 of this is that, by the time Mr. Ficeto was indicted, he had already lived with a set of  
9 escalating consequences from this conduct for over eight years; by the time he went  
10 to trial, it had been twelve years since Homm disappeared. In the interim, he dealt  
11 with civil litigation by an investor, and then by the hedge funds, and then by the  
12 SEC, and then asset forfeiture by the government. Mr. Ficeto always acted  
13 uprightly in handling these matters, and worked cooperatively with the government  
14 on the asset forfeiture cases. In the end, between the amount he forfeited and the  
15 amount he paid for counsel, Mr. Ficeto was largely stripped of everything he owned.  
16 At the same time, his personal life was in turmoil, with his marriage ending, his  
17 business closing and not being able to secure a job. The psychological toll that this  
18 has taken on Mr. Ficeto is not something that can be quantified; because it cannot be  
19 quantified, such things are often discounted. But this has been the central story of  
20 Mr. Ficeto’s life for the past twelve years, and the damage to his family and his  
21 person should not be discounted as the Court decides how he should be further  
22 punished.

23       In various places, the government overstates the facts in support of its effort  
24 to paint Mr. Ficeto as a man deserving an 8-year sentence. While many of these  
25 points are addressed in our opening brief, we respond to a few here that bear special  
26 mention.

27       First, the penny-stock companies were real companies, a point that bears  
28 emphasizing. These were small companies looking for money to build their

1 businesses. While in most instances, Hunter World Markets assisted in helping  
2 them go public, that was not true in every case. For example, MicroMed, a  
3 company focused on developing heart valve technology, had already gone public  
4 and received rounds of financing before the Absolute Capital hedge funds invested  
5 in it. And there were a number of companies where there were various investors  
6 other than the Absolute Capital hedge funds; MicroMed was one, but ProElite was  
7 another – in the case of ProElite, CBS made a significant investment, and ProElite  
8 had a contract with Showtime to broadcast mixed martial arts fights on the  
9 Showtime network. In the end, UFC became the dominant player in this space, but  
10 ProElite was its main competitor for a time, as Doug DeLuca testified.

11 Not only were these real companies, but the transactions were all handled in  
12 the ordinary way. Tom Poletti (formerly of KL Gates, now at Manatt, Phelps &  
13 Phillips) and David Ficksman (at Troy & Gould) handled various securities offering  
14 transactions, and they testified that nothing about them was out of the ordinary.

15 Second, while the government returns to Mr. Ficeto's convictions for failure  
16 to advise the SEC of the use of an Instant Messaging system, in May 2008, and  
17 failing to advise the SEC in September 2008 of the existence of an overseas bank  
18 account, it fails adequately to acknowledge that it was Mr. Ficeto, through his  
19 counsel, who provided the IMs to the government and who voluntarily informed the  
20 SEC of the overseas account. This is not the stuff of the ordinary fraud case, or the  
21 ordinary "pump and dump" case. The fact of the jury's conviction on these counts  
22 must be tempered by the fact that Mr. Ficeto acted quickly, and voluntarily, to  
23 correct these matters. It is simply not the profile of an ordinary fraud case where the  
24 subject comes back to volunteer a correction of something as significant as the  
25 existence of an overseas back account.

26 Nor is it the ordinary fraud case where the defendant pays his taxes – the  
27 government has never contended otherwise – and discloses the holdings of his  
28 foreign bank account to the IRS. Once again, this case calls out for a fuller picture

1 than what the government has offered, or what we believe the PSR will reflect. It is  
2 notable that Mr. Ficeto used respected estate planning counsel to set up this offshore  
3 trust, and that he then filed annual reports about it with the IRS. While we respect  
4 the jury's verdict, many of the facts here regarding Todd Ficeto's conduct do not  
5 reconcile with that verdict and call out for seeing this as a case with many shades of  
6 gray, not just a picture in black and white. And, as this Court knows from its  
7 experience, the task of sentencing a defendant is the most serious obligation of any  
8 judge, and calls out for the most sober and inclusive consideration of the facts in  
9 order to impose a just punishment.

10 The government acknowledges that any loss amount needs to take account  
11 only of the loss that is related to the fraud, and that the stated loss amounts do not  
12 disaggregate "fraud-based loss" from other factors that may have been involved in  
13 the loss. The government does not attempt to take on this task; as it noted in its  
14 motion in limine, "the calculation of such losses can be extraordinarily complex in  
15 artificial inflation cases." But where there is no effort to undertake such a  
16 disaggregation, and where the sentencing enhancement requires a finding, based on  
17 clear and convincing evidence, of the loss due to the fraud (and not anything else) to  
18 determine the appropriate increase in levels, the sentencing enhancement should not  
19 be added in the first place. The government justifies its request for a variance based  
20 on an inability to disaggregate elements of the loss, but that inability should, rather,  
21 eliminate the initial increase – which here is in the range of 26 levels.<sup>1</sup>

22 Considering the various factors under § 3553, the treatment of other  
23 participants in this scheme, the age of the case and the personal suffering that the  
24 past twelve years have imposed on Mr. Ficeto, and the difficulty of establishing loss,

---

25  
26 <sup>1</sup> The same problem of determining loss affects the restitution calculation;  
27 however, defendant will address this in further detail in response to the updated  
28 PSR, once it is filed.

1 Mr. Ficeto respectfully submits that a term of probation is appropriate.  
2

3 DATED: February 10, 2020

Respectfully submitted,

4 Gary S. Lincenberg  
5 Thomas V. Reichert  
6 Bird, Marella, Boxer, Wolpert, Nessim,  
7 Drooks, Lincenberg & Rhow, P.C.

8 By: /s/ Thomas V. Reichert

9 Thomas V. Reichert  
10 Attorneys for Defendant Todd Michael  
11 Ficeto  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28